UNITED
NATIONS

AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 762

Case No. 827: SMITH

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, Vice-President, presiding; Mr. Mayer Gabay; Ms. Deborah Taylor Ashford;

Whereas, at the request of Deborah Baruch Smith, a staff member of the United Nations Children's Fund (hereinafter referred to as UNICEF), the President of the Tribunal, with the agreement of the Respondent, successively extended the time-limit for the filing of an application to the Tribunal to 30 September 1994 and 31 December 1994;

Whereas, on 7 December 1994, the Applicant filed an application requesting the Tribunal:

"...

(a) To find that Respondent denied Applicant due process by:

i. Not granting ... fair and proper consideration ... to her candidacy for the post of Senior Public Affairs Assistant, Public Participation Section, Division of Public Affairs, UNICEF, GS-7 level, PAT No. 00510;

ii. The fact that the short list presented to the Appointment and Placement Committee was not comprised of 'all qualified candidates,' as admitted by Respondent, thereby omitting Applicant's candidature; and

iii. Denying Applicant her rights accorded under UNICEF personnel policy as stated in its Personnel Administrative Manual, Chapter 4.5.26, ...;

(b) To find that Applicant's exclusion from review by the Appointment and Placement Committee discriminated against her and thus deprived her of 'fair and proper' consideration;

(c) To find and rule that UNICEF breached its own basic procedures and policy, as presently established in its Personnel Administration Manual (PAM), Volume I, Chapter 4, item 4.5.26, requiring the full Appointment and Placement Committee to review **'all qualified candidates'** (emphasis added) applying for posts advertised under the Vacancy Management System;

(d) To find that the Joint Appeals Board's recommendation ... was incorrect in that it did not address the critical issues raised by Applicant, namely that she did not receive 'fair and proper' consideration for the post in accordance with UNICEF policies and procedures. ..."

Whereas the Respondent filed his answer on 3 January 1995;

Whereas the Applicant filed written observations on 1 February 1995;

Whereas the Applicant submitted an additional document on 1 April 1996 and, on 15 May and 6 June 1996, the Respondent provided his comments thereon;

Whereas, on 7 June 1996, the Respondent submitted an additional document;

Whereas, on 18 June 1996, the Applicant filed a further statement;

Whereas, on 22 July 1996, the presiding member of the panel ruled that no oral proceedings would be held in the case;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNICEF on 13 May 1985, as a Secretary in the Division of Personnel, at the G-3 level, on a short-term appointment. On 13 November 1985, she was granted a fixed-term appointment for one month and nineteen days; this was successively extended through 1 November 1989. On 1 June 1986, the Applicant was promoted to the G-4 level, as a Senior Secretary in the Media Relations Section of the Division of Information and Public Affairs. On 1 December 1988, she was promoted to the G-5 level, as Principal Secretary, Division of Personnel. In July 1989, the Applicant went on mission as Senior Secretary to "Operation Lifeline Sudan", in Nairobi. On 1 November 1989, she was granted a probationary appointment. In March 1990, she was seconded as a Senior Secretary to the "Programme Mobilization Unit of the World Summit on Children". On 1 May 1990, she was granted a permanent appointment. On 26 December 1990, the Applicant was appointed Senior Secretary in the Media Relations Section of the Division of Information. In January 1993, the Applicant's functional title was changed to Media Assistant.

On 7 December 1992, the Applicant applied for the post of Senior Public Affairs Assistant, Public Participation Section, Division of Public Affairs. A total of 26 candidates applied for the vacancy. The General Service Recruitement and Placement Section (RPS) of the Division of Personnel reviewed all the candidates and made an initial short list, including the Applicant. This list was sent to the supervisor of the post, who prepared a short list and who recommended a candidate to the Selection Advisory Panel (SAP), of which he was a member.

The SAP met on 2 February 1993. It was constituted by the supervisor of the post, a representative from the Appointment and Placement Committee (APC) and a representative from the Division of Personnel. The SAP recommended the appointment of the candidate recommended by the supervisor of the post, whom it considered as fully meeting the requirements of the post, as well as being the best qualified of the candidates whose posts had been abolished. On 9 February 1993, the UNICEF New York General Service APC endorsed the SAP's recommendation, "acknowledging the importance of placing as many abolished post staff as possible, within the parameters of job qualifications". The appointment was approved by the Executive Director on the same day.

In a memorandum dated 24 February 1993, the Applicant informed an Assistant Recruitment Officer that she had learned from a third party that another candidate had been selected. When she had requested the APC minutes relevant to her candidature, she had been told there was "nothing to show me because my candidacy was neither mentioned nor discussed at, nor was my application seen by, the APC. ... because I was not a short-listed candidate". She requested to be informed of the reasons for her not being short-listed and to be shown the SAP minutes relating to her candidature.

In a reply dated 3 March 1993, the Assistant Recruitment Officer advised the Applicant as follows:

> "In line with the Director, DOP [Division of Personnel] circular CF/DOP/92-013 (copy of which is included in all files going to supervisors and APC Rep[resentative]s), priority should be given to staff members in abolished posts. Papers on these, plus background material on permanent staff members (yours included) were sent to the supervisor. After an extensive review, he short-listed those applicants whom he considered to be best suited. The case was submitted to the SAP and the APC, where the final selection was proposed, and the Executive Director endorsed the recommendation.
>
> ..."

On 17 June 1993, the Applicant requested the Executive Director to intervene. In a reply dated 16 July 1993, the Deputy Executive Director (Operations) advised the Applicant, inter alia, as follows:

> "... after a review of all applicants ..., the Recruitment Section short-listed all permanent staff members in abolished posts as well as permanent staff applicants who had the most relevant experience and skills. Your candidature was among those applicants initially short-listed and your papers were sent to the supervisor of the post.
>
> The supervisor then reviewed the applicants, inclusive of yourself, with particular attention to the initial shortlisting done by the Recruitment Section. He then did an additional shortlisting, focusing primarily on staff in abolished posts who fulfilled the specified job requirements and staff already at the G-6 or G-7 level.
>
> The Selection Advisory Panel reviewed the list of applicants and concurred with the shortlisting presented. Following a careful review they recommended the appointment of the selected applicant as fully meeting the requirements of the vacancy as well as being on an abolished post.
>
> Acknowledging the articulated importance of placing as many abolished post staff as possible, within the parameters of job qualifications, the Appointment and Placement Committee agreed with the findings of the SAP that the selected applicant was the most suitable candidate and accordingly endorsed her appointment. This appointment was approved by the Executive Director.

Considerations

After reviewing the selection process as outlined above, we cannot concur with your allegation that you were treated unfairly. Your application received full and fair consideration in line with our existing organisational policy.

We note your request for specific written answers to all your queries as to why you were not short-listed. You were indeed short-listed by the Recruitment Section, as indicated above, but not by the supervisor of the post. Additionally, we would like to draw your attention to the guiding principle maintained by the United Nations Administrative Tribunal that

the Executive Director has wide discretionary power in the selection of staff to fill vacant posts. UNICEF's obligations toward staff are to ensure that their applications receive consideration under the guidelines of the selection process. This was certainly done in your case. Further, the purpose of allowing for all vacancy notices to be advertised is to allow for an open competition among staff. It is then up to the prerogative of the Organisation to best determine, in accordance with our existing review mechanisms, which staff best match the qualifications.

Also it is not organisational policy to share with staff the full substance of deliberations on the selection process, inclusive of the supervisor's recommendation, and the SAP minutes. However, we note that both the Deputy Director, DOP, and the Director, DOI, as a courtesy took the time to speak to you at length about your application for this post. As explained to you during your discussions, while you are certainly entitled to your opinion as to the merits of your candidature, the unanimous recommendations of the SAP and the APC are clear indications that the best interests of the Organisation were served by the appointment of the selected candidate.

Further we note your query that 'If I am not qualified for a job which would be the next logical step in my career path, what is it that I need to advance at UNICEF'. A reading of your official status file indicates that in the past few years you have applied for a dozen or so different posts in various divisions, having considered yourself to possess the qualifications required. It thus appears that your career aspirations could well be pursued in a number of directions. UNICEF information circular 1986-17 on Career Development in UNICEF outlines the overall organisational policy and you may wish to consult that circular. Lastly, you are presently at the G-5 level and your application was for a G-7 post. Normally staff either at the level of, or one level below, are considered for vacancies and it is only very exceptionally that the Organization would appoint somebody more than one level below the post.

In conclusion we certainly do understand your disappointment in not being appointed for a post to which you aspired. However this post was subject to open competition and your candidature was given consideration. We therefore do not consider as valid your allegation that you were treated unfairly.

Please accept our assurances that the Organization does indeed value your work and your contributions and we trust you will continue to perform, as you have been doing, in an entirely satisfactory manner."

On 26 July 1993, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 21 April 1994. Its conclusions and recommendation read as follows:

"Conclusions

...

22. The Panel initially addressed Appellant's claim that, in effect, her qualifications and work experience were such that she should have been selected for the subject post. As Respondent states in its [sic] reply, however, the Administrative Tribunal has made it clear that the 'assessment of candidates for posts is a responsibility within the lawfully exercised discretion of the Respondent. Neither the Tribunal (nor the JAB, as indicated in its report) can substitute its evaluation for that of the Respondent.' (Tribunal Judgement No. 594, Del Rosario-Santos). The Panel, therefore, 'would not substitute its view for that of the Secretary-General concerning the evaluation of the [Appellant's] performance, since the selection of a staff member for a particular post or for promotion rests within the discretionary authority of the Secretary-General.' (Tribunal Judgement No. 554, Fagan).

23. The Panel next considered Appellant's claim that there was a breach of procedure in UNICEF's consideration of Appellant for the subject post. In this regard, the Tribunal has indicated that 'the existence of prejudice or improper motive, breach of procedure or any other extraneous factor' may vitiate a decision (e.g., for appointment or promotion) contested by Appellant (Tribunal Judgement 554, Fagan).

24. Appellant contends that the APC is 'the only body formally established to give advice on promotion issues,' and that 'it is essential that information on all qualified candidates' be given to the APC to protect the Organization's interest in having the best candidate selected for any post and the staff member's interest in being given full and fair consideration. Appellant claims that, with respect to the

subject post, while her application was considered by the SAP, it was not presented to the APC. She maintains that this constituted a serious breach of procedure which precluded her from receiving due and fair consideration for the subject post.

25. In order to address Appellant's claim, the Panel reviewed the procedures set forth in the UNICEF Personnel Administration Manual, Chapter 4, describing the role and function of the Recruitment and Staff Development Section (RSDS), SAPs and the APC. Under the UNICEF's procedures, the SAP evaluates all qualified candidates for a particular post and, following such evaluation process, makes a recommendation to the APC for the selection of a specific candidate for such post. UNICEF's procedures specify that the SAP is to provide the APC with, among other documentation, 'the findings and recommendations of the [SAP] on all qualified candidates' (emphasis added).

26. As Appellant had urged, the Panel requested minutes of the APC relevant to the subject vacancy, as well as documentation submitted to the APC regarding the Appellant, to determine whether information regarding Appellant's candidature was provided to the APC. The Panel confirmed that, contrary to Appellant's claim, information regarding all applicants for the subject vacancy, including the Appellant, was submitted to the APC. The Panel noted that Appellant's level (G-5) was two grades below the level of the subject vacant post (G-7), and that the selected candidate was a permanent staff member at the G-6 level.

27. Based on the foregoing, the Panel concluded that Appellant's claim of a breach of procedure was without merit.

Recommendation

28. In light of the foregoing, the Panel recommends that the subject appeal be denied."

On 9 June 1994, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed her that the Secretary-General had accepted the JAB's recommendation and decided to take no further action in the case.

On 7 December 1994, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant was denied full and fair consideration with regard to the selection process for the post of Senior Public Affairs Assistant.

2. The UNICEF Personnel Administration Manual requires that the APC be furnished with the findings and recommendations of the SAP on all qualified candidates. The Applicant has been acknowledged as a qualified candidate but her candidacy was not considered by the APC or the SAP.

Whereas the Respondent's principal contentions are:

1. The Applicant has no right to promotion but only a right to be considered for promotion.

2. The Applicant was fully and fairly considered for promotion in accordance with the applicable procedures.

The Tribunal, having deliberated from 8 to 26 July 1996, now pronounces the following judgement:

I. The Applicant appeals from a decision by the Secretary-General, accepting a recommendation by the JAB to reject the Applicant's appeal. The Applicant, a staff member at the G-5 level, claims that she was denied proper consideration for the G-7 level post for which she applied, in response to Vacancy Announcement L692-062. Her application was, in turn, submitted to the General Service Recruitment and Placement Section (RPS), which, in accordance with the procedures set forth in the UNICEF Personnel

Administration Manual (PAM), screened all the candidates and established a short list that included the Applicant's name. The PAM requires that, as next step in the selection process, the supervisor make a recommendation. In this case, in addition to the recommendation, the supervisor drew up a new short list, which was more restrictive than that drawn up by the RPS. This list consisted, chiefly, of the names of those candidates who were encumbering posts slated to be abolished. The Applicant's name was not included in this list. When the Selection Advisory Panel met, it reviewed the candidates included in both lists. The next step, according to the PAM, was to be a review by the APC of "all qualified candidates".

II. The Respondent submits that "The full list of Applicants, inclusive of the Appellant, was provided to the APC. This list provides reports on the candidates initially short-listed by RPS, such as employment history, education, skills, languages and UN/UNICEF experience."

The Applicant claims that this "does not come close to meeting the very specific requirements of UNICEF Personnel Administration Manual Rule 4.5.26", which states that "the findings and recommendations of the SAP on all qualified candidates" should be submitted to the APC.

III. The Tribunal notes that the basic issue is not whether the documents relating to the Applicant, submitted to the APC, were those required by the rules, but whether the documents submitted were actually examined by the APC.

IV. In the Tribunal's view, there is sufficient evidence to conclude that such documentation was not considered by the APC.

Nowhere does the Respondent claim more than that the documentation, complete or otherwise, was made available to the APC. The Applicant claims that she was informed verbally that her candidacy "was neither mentioned nor discussed at ... or seen by the APC". In his second submission to the JAB, the Respondent asserts that "the full list of applicants, including the Appellant, was provided to the APC". He never asserts, however, that her candidacy was actually considered by the APC. Furthermore, when explaining the reasons for not showing the APC's minutes to the Applicant, the Respondent states that "it is UNICEF's policy to share excerpts of APC minutes with the staff specifically mentioned in the minutes". The Tribunal is of the view that the complete absence of any reference to the Applicant in the minutes clearly shows that her candidacy was not considered.

V. In the Tribunal's view, the Applicant's candidacy should have been considered by the APC. In his submission before the JAB, the Respondent contends that it would be absurd for the APC to examine every single candidate and that "if one were to follow Appellant's logic, then there would be no need for RPS to do an initial screening, nor for a further review by the SAP".

The Tribunal, at this stage, will not enter into the question of whether all the candidates, or only those deemed "qualified", should be reviewed by the APC. It recalls, however, that the Applicant was included in the short list drawn up by RPS. That alone is sufficient to show that the Applicant was considered qualified. That this short list was supplemented by another more restrictive short list drawn up by the supervisor does not alter the fact that the only short list contemplated in the rules is that drawn up by the RPS (Rule 4.3.6). The inclusion of the Applicant's

name in that list was sufficient to warrant its consideration by the APC, irrespective of whether the APC should consider all candidates or only "qualified" ones.

VI. For the foregoing reasons, the Tribunal finds that the Applicant was not granted full and fair consideration when applying for the post of Senior Public Affairs Assistant, in the Division of Public Affairs, and orders the Respondent to pay her US$1,000.

All other pleas are rejected.

(Signatures)

Luis POSADAS MONTERO
Vice-President, presiding

Mayer GABAY
Member

Deborah Taylor ASHFORD
Member

Geneva, 26 July 1996

R. Maria VICIEN-MILBURN
Executive Secretary